BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: RIVER RANCH FRESH FOODS-SALINAS, INC. 1156 Abbott Street Salinas, CA 93901 Employer	Docket No. 01-R6D2-1977 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by River Ranch Fresh Foods–Salinas, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On December 14, 2000, a representative of the Division conducted an inspection as part of a multi-agency agricultural sweep at a place of employment maintained by Employer at the Benson Ranch on Forrester and State Route 86, Westmoreland, California (the site). On April 23, 2001, the Division issued a citation to Employer alleging a general violation of section[1] 3457(c)(3)(B) [unusable toilet facility] with a proposed civil penalty of $750.

Employer filed a timely appeal contesting the existence of the alleged violation, the abatement requirements, and the reasonableness of the proposed civil penalty. Employer accompanied the appeal with a motion to dismiss the citation on various grounds.

On July 11, 2002, a hearing was held before Dale A. Raymond, Administrative Law Judge (ALJ), in San Diego, California. Jim Boyer, Safety Manager, represented Employer. Zohra Ali, Associate Industrial Hygienist, represented the Division.

[1] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

On August 1, 2002, the ALJ issued a decision denying Employer's appeal and its pre-hearing motion to dismiss the citation, and assessing a civil penalty in the amount of $750.

On August 29, 2002, Employer filed a petition for reconsideration. On October 3, 2002, the Division filed an answer to the petition. On October 17, 2002, the Board took Employer's petition under submission and stayed the ALJ's decision pending a decision on the petition for reconsideration.

EVIDENCE

Zohra Ali (Ali), Associate Industrial Hygienist, performed an agricultural inspection on December 14, 2000, at the site with Carlos Bowker (Bowker), a representative from DLSE (Division of Labor Standards Enforcement). Ali observed Employer's employees cutting off iceberg lettuce heads and putting them on a tractor. She took pictures of the overall operation, which were admitted as Exhibits 3 and 4 at the hearing. Employer had 34 employees in the field.

Ali held an opening conference at the site with the harvest crew supervisor, Philemon Lizaola (Lizaola). With Lizaola present, Ali walked about the lettuce field, observed the operations, interviewed employees, and reviewed Employer's documents. Lizaola called Employer's field representative, Delia Gill (Gill), who arrived a short time later.

At one point, Ali, Bowker, Lizaola, and Gill were standing across the road from a toilet facility, consisting of three toilet units resting on top of a platform trailer. The toilet facility was parked on a road in front of a lettuce field. Ali took a picture admitted as Exhibit 5. The trailer was not hooked up to any vehicle. A truck with Employer's name was parked by the facility. (Exhibit 6).

Ali observed that a worker came from the field and entered the toilet on the far right. Bowker, who translated Spanish to English for Ali, told Ali that this worker was Employer's employee. The trailer tipped to the right all the way to the ground. The worker quickly exited the toilet and went back into the field. Ali pointed the condition out to Lizaola and Gill. Ali told them that the condition was dangerous so Lizaola lifted and braced the end of the trailer where it tipped to the ground. This abated the dangerous condition. Ali watched Lizaola and took a picture of him bracing the facility (Exhibit 6). Employer's crew was on the left side of the pictures. After Ali was finished interviewing Lizaola, she unsuccessfully tried to find the worker who tried to use the facility.

Ali particularly remembered this incident because it was unusual for a violation to be abated while she was standing there. She determined that the toilet unit was not operational because it was not stable when the employee attempted to use it. Ali issued a citation for a general violation of

section 3457(c)(3)(B) with a proposed civil penalty of $750 which is the statutorily mandated minimum penalty for this type of violation.[2]

Jim Boyer (Boyer), Safety Manager for Employer, testified that Employer takes pride in its safety operations. Supervisors are trained to respond to and recognize hazards and dangerous conditions. They are required to see that employee exposure to hazards does not exist and that hazards are abated.

Boyer testified that Lizaola, as foreman, was responsible for parking and positioning of the toilets. He continually moved sanitation trailers to keep them near working employees. The trailers remain hooked up absent an emergency. Lizaola was responsible to ensure that the trailer was not parked on a hillside, drainage ditches, soft furrows, or other unstable ground. Parking a trailer so as to create a tipping hazard would be in violation of Employer's code of safe work practices. All trailers have adjustable support stands, but they are not lowered to prevent damage in the event the trailer is moved without the stands being raised.

According to Boyer, on the day of the inspection Employer's crew was harvesting lettuce. There were buildings and houses next to the field in which Lizaola's crew was working which can be seen in Exhibits 3 and 4. The field shown in Exhibits 5 and 6 is not the one in which Lizaola's crew was working. Boyer was not present at the site on the day of the inspection.

At the hearing, Boyer showed videos admitted into evidence demonstrating the stability of Employer's trailers. Employer contracts with Shorty's Portable Toilets (Shorty's). In November 2000, all the sanitation trailers were reworked to equip them with three toilet units, state of the art sinks, towel dispensers, and soap dispensers. One video showed that the reworked facilities would not tip even when a 250-plus pound man stood on the trailer.

Boyer, who has worked for Employer for two years, stated that often several harvesting operations are going on at the same time. Different crews can be working near each other in the fields. He believed that Ali confused Employer's crew with another employer's crew because Bowker's aggressive attitude caused her to be confused. In spite of Employer's pre-hearing discovery request seeking all photographs possessed by the Division, Boyer stated that the only photograph Employer received prior to the hearing was Exhibit 6, showing a man jacking up a sanitation trailer.

Gill, Field Representative for Employer, testified that Lizaola called her on the day of the inspection. When she arrived, Ali was looking at Employer's first aid kit, Illness and Injury Prevention Program (IIPP) and other documents, with the items spread out on the hood of Employer's pick up. Gil stated that toilets were connected to the back of the pickup. Ali did not say anything

[2] Labor Code section 6712(d)(1).

about toilets to Gil. Gill did not remember anyone coming to use the toilet facility. Exhibits 5 and 6 were not in the same general area where this group was standing. The truck in front of the toilets shown in Exhibit 5 was Employer's truck.

Lizaola testified that he was the harvest crew supervisor. He was responsible for moving the toilet trailer every day. He lowered the two trailer stands so that the trailer would stay in the same place. On the day of the inspection, his crew was removing lettuce heads. The name "Shorty's" is on the side of all of Employer's toilets. If the trailer were unhooked without the trailer stands being put down, the toilet would tip and would not be safe to use.

Lizaola stated he does not remember anyone coming to use the toilets on the day of the inspection. He does not remember having to fix an unstable trailer. He recalls having a discussion about the toilets with Ali and he was asked what would happen if there were no trailer stands. He told Ali that the toilets could move and that lowering the stands was his responsibility. The toilets shown in Exhibits 5 and 6 were not toilets that Employer provided because these toilets were not hooked to a truck. They were not next to the field in which Lizaola's crew was working but were on the other side of the road. Lizaola denied that he was the man shown in Exhibit 6 because he always wears a sombrero and the man in the photograph was not wearing a sombrero.

Lizaola testified that he spoke to Ali very little before Gill arrived. Although Lizaola does not speak English, he understood most of what Ali said.

ISSUES

1. Did the ALJ commit prejudicial procedural error in admitting the Division's photographs into evidence?
2. Does the evidence establish a violation of section 3457(c)(3)(B)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The ALJ Did Not Improperly Admit the Division's Photographs

Employer contends that the ALJ committed procedural error which prejudiced Employer because the Division failed to comply with discovery regulations by not providing all photographs taken by the inspector. Employer argues that all of the photographs consisting of Exhibits 3, 4, 5 and 6 should have been excluded based upon the Division's failure to comply with the discovery requirements pursuant to section 372.7, and requests that

Employer's claim be established that the cited toilet facility was not provided by Employer.[3]

Our review of the record reveals that Employer made a written discovery request to the Division for photographs. The Division responded to the request and in a Documentation Worksheet (Form Cal/OSHA 1B) identified two photographs (#4730 [Exhibit 5] and #4737 [Exhibit 6]) in connection with the violation for which Employer was cited. Employer maintains that it only received one photograph (#4737) which depicts a person allegedly correcting the violative condition of the unstable trailer.

A party claiming that its request for discovery has not been complied with may serve and file a motion to compel discovery pursuant to section 373.6. The record does not indicate that Employer sought either informally or by a motion to compel production of the remaining photograph prior to the hearing despite the fact it was previously notified that two photographs of the trailer with toilets existed but had only received one photograph.

Additionally, Ali testified that only one photograph was produced by the Division based upon a conversation with Boyer subsequent to the discovery request where Employer's discovery request and the cost of the discovery items were discussed. Ali testified that Boyer stated he only wanted the single picture showing a person bracing the trailer with supports. Boyer did not deny that the conversation regarding the requested photograph took place nor did he deny that he modified the discovery request to seek only the one photograph (Exhibit 6).

Regarding other photographs (Exhibits 3 and 4) which Employer seeks to have excluded, we find that Employer specifically admitted that the two pictures accurately depicted the lettuce harvesting operation performed at the site on the date of inspection and Employer, in fact, used the photographs for its own purposes during its defense at the hearing and in its petition for reconsideration.[4] Thus, we find that Employer suffered no prejudice in the admission of the photographs. [5]

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[3] Section 372.7 provides that sanctions may include an order prohibiting the introduction of designated matters into evidence by the abusing party, an order establishing designated facts, claims, or defenses against the abusing party, or any other order as the ALJ or Appeals Board may deem appropriate under the circumstances.

[4] In its petition for reconsideration, Employer also utilizes all of the photographs consisting of Exhibits 3, 4, 5, and 6 to support its position that such evidence along with the testimony of the Division's witness proves that the toilets were not Employer's.

[5] We would be inclined to rule differently regarding Exhibits 3 and 4 under different circumstances and in the absence of Employer's admissions regarding the photos and Employer's use of them for its own case. The Division's inspector explained that the two photographs (Exhibits 3 and 4) were taken in connection with the general inspection and were not produced pursuant to the discovery request because they did not directly pertain to *the violation* for which Employer was cited (i.e., inoperable toilets). We do not agree that the distinction made by the Division is valid for purposes of complying with Employer's discovery request. It is improper for the Division to unilaterally determine the degree of relevance or usefulness of any of the pictures that were taken in connection with the inspection. Any photographs which were in the Division's possession taken in connection with the inspection must be produced by the Division in response to a discovery request which specifically seeks all photographs. The pictures of the lettuce

Under these circumstances, we do not find that a basis exists for sanctions pursuant to section 372.7 to justify the relief sought by Employer of striking the photographs and establishing Employer's claim that the toilets were not Employer's.

2. The Evidence Establishes a Violation of Section 3457(c)(3)(B)

Employer makes several arguments which essentially challenge the evidentiary findings of the ALJ as well as the finding that Employer violated section 3457(c)(3)(B).

Our review is not strictly appellate in nature but is based upon a thorough reconsideration of the issues brought before us. Our independent review of the record reveals that there was no dispute that Employer's employees were harvesting lettuce at the location during the inspection by Ali and that Employer supplied toilet facilities for its employees' use at the field harvest operation. Also, there was no dispute that toilets placed upon a trailer which could tip so that one side is on the ground would be non-operational within the meaning of section 3457(c)(3)(B).

The several evidentiary findings contested by Employer pertain to findings based upon disputed evidence and credibility determinations made by the ALJ. Generally, we give deference to factual findings of the ALJ unless they are opposed by evidence of considerable weight (*Lamb* v. *Workmen's Compensation Appeals Board* (1974) 11 Cal.3d 274). Absent substantial evidence to the contrary, we will not disturb credibility findings made by the ALJ who was present at the hearing and able to directly observe and gauge the demeanor of the witness and weigh his or her statement in light of his or her manner on the stand. (*Garza* v. *Workmen's Compensation Appeals Board* (1970) 3 Cal.3d 312, 318; *Metro-Young Construction Company*, Cal/OSHA App. 80-315, Decision After Reconsideration (Apr. 23, 1981).) Our review of the evidence in view of the whole record does not justify reversal of the ALJ's findings.

a. The Evidence Established a Violative Condition

There was conflicting evidence regarding Ali's observation of the tipping of the trailer when an employee attempted to use one of the toilets that was placed upon the trailer which was unsupported at one end. Our review of the record indicates that there was sufficient evidence presented for the ALJ to make a credibility-based finding that Ali directly observed the incident which demonstrated the violative condition and the ALJ specifically discredited the testimony of Lizaola and Gill who could not remember if the incident ever

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harvesting operation performed during the inspection depicted in Exhibits 3 and 4 are arguably relevant to the applicability of the safety order for which Employer was cited and for which Employer contested in its appeal.

occurred.[6] Since there is credible evidence that the violative condition existed, we find, as the ALJ did, that a violative condition under section 3457(c)(3)(B) existed at the site.

Employer also disputes that the toilets for which it was cited were provided by Employer. Employer argues that the toilets depicted in Exhibits 5 and 6 were not provided by Employer and suggests that some other employer provided the subject toilets to their own employees who worked nearby. Employer's evidence regarding ownership of the non-operational toilet facilities was primarily provided by Boyer, who was not present during the inspection. Thus, while Boyer could testify to Employer's general practices and procedures for providing toilet facilities, he was not present on the day of the inspection, as noted by the ALJ, and thus could not establish if there was some exception to the toilets that were in fact used or what actually occurred on that day.

Since the ALJ discredited the testimony of Lizaola and Gil based upon credibility determinations, such findings affect the weight to be given to their testimony. The ALJ determined that both Boyer's and Lizaola's testimony regarding Employer's exclusive use of reworked toilets supplied by "Shorty's Portable Toilets" could not be credited and was based upon hearsay which was further deemed weaker and less satisfactory evidence given that Employer knew it contested ownership of the toilets. The ALJ found and we concur that it was within the Employer's power to produce stronger evidence that it contracted exclusively with Shorty's and that all its facilities were reworked in November 2000. (See Evidence Code section 412)[7] In view of the ALJ's findings affecting the weight of Employer's evidence, Employer has not established that "considerable evidence" exists in the record to reverse the finding of the ALJ (*Garza v. Workmen's Compensation Appeals Board, supra,* and *Metro-Young Construction Company, supra)* that Employer supplied the cited toilet facilities.[8]

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[6] Both Lizaola and Gill did not recall observing the incident despite Ali's testimony that they were standing together with Ali when the incident occurred. Employer also argues that Ali's testimony that an employee came from the field behind the toilets depicted in Exhibit 6 can support *only* the inference that the employee who attempted to use the toilet came from the other crew in the field south of the road where the toilets were placed. We do not find the inference offered by Employer to be either conclusive or compelling. Our review of Ali's testimony reveals that she observed a male employee come from behind the toilets from where Ali was standing along with Gil and Lizaola. The fact the employee came from behind the toilet does not establish that the employee *necessarily* came from the crew working far off in the field behind the toilets, especially if the Division and DLSE inspections were in the immediate area in front of the toilets from where the photographs (Exhibits 5 and 6) were taken by Ali.

[7] Employer maintains that the ALJ improperly dismissed as hearsay the evidence that Employer used only toilets supplied by a specific company, Shorty's, whose sign was not present on any of the toilets in any of the exhibit photographs. Employer's witnesses testified based upon their observation that all toilets used by Employer have a sign stating "Shorty's" on them. Contrary to Employer's characterizations, the ALJ did not dismiss the witnesses' testimony as hearsay but viewed such evidence with distrust in the absence of other direct evidence that Employer exclusively contracted with Shorty's—evidence which was within Employer's power to produce which it did not. The ALJ expressly discredited Lizaola's testimony regarding ownership of the toilets.

[8] In its petition for reconsideration, Employer argues that the ALJ's credibility determinations are without merit, arbitrary and capricious. Employer first disputes the credibility determinations by offering explanations for giving more weight to Employer's witnesses and less weight to Ali's testimony. However, Employer cites no authority for disturbing the credibility determinations upon such asserted explanations. In any event, Employer's assertions do not amount to "considerable evidence" to the contrary in order to justify reversal of the credibility determinations.

We agree with the findings of the ALJ that the preponderance of evidence supports the finding that Employer provided the violative toilet facilities for which it was cited.

Employer further asserts that Employer's toilets complied with the safety order and that the toilets depicted in Exhibit 6 were operational. Employer however, simply re-argues the evidence which is inconsistent with our findings and the findings of the ALJ, including credibility determinations, which we adopt. Thus, we reject Employer's arguments as inconsistent with our findings.

b. Employer's Employees Were Exposed to the Violative Condition

Employer asserts that the ALJ acted in excess of her authority in stating that Employer's pick-up truck parked near the toilets was presumably driven by an employee of Employer and was close enough to use the facility, and thus, establish employee exposure even though the unsupported trailer with the toilets belonged to another employer.

Since we have found above that the preponderance of the evidence, including the relative weight given to the testimony of witnesses based upon the ALJ's credibility determinations, establishes that Employer provided the cited toilet facilities at the site, Employer's assertion is misplaced. However, since Employer also challenges the finding of employee exposure, we will address that fundamental issue.

To find employee exposure, there must be reliable proof that employees are endangered by an existing hazardous condition. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182 (Decision After Reconsideration, (July 26, 1977).) As we recently held, employee exposure may be established by a showing of "actual" exposure, or by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise that employees have been, are, or will be in the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) Reasonable predictability is an objective standard and is *not* analyzed from a subjective point of view requiring that the Division show that the employer knew that access to a violative condition was reasonably predictable. (*Id.*, citing *Phoenix Roofing, Inc.,* 17 OSHC 1076, 1079, 1993-95 OSHD ¶ 30,699 (1995).) The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. (*Id.*, citing *RGM Construction Co.,* 17 OSHC 1229, 1234, 1993-94 OSHD ¶ 30,754 (1995).)

In this case, we find that the evidence establishes that it was reasonably predictable that the non-operational toilets were accessible to Employer's employees. Notwithstanding Employer's position that the cited toilets were provided by some other employer which we have rejected, the testimony of Employer's witnesses established that Employer always provides toilets to its employees and toilets were provided to its lettuce harvesting crew on the day of

the inspection. Lizaola and Boyer testified that the toilets were moved throughout the workday as the crew progressed in order to keep the facility in proximity to the harvesting crew.[9] This practice and the proximity of the facility to the crew created, by operational necessity, a condition where employees would likely attempt to use the non-operational facilities provided by Employer during the time they were present and available for employee use. The presence of Employer's truck parked in close proximity to the subject toilets is further circumstantial evidence of access to the hazard by Employer's employees which includes the driver of the truck.

In view of the standard for establishing employee exposure, the fact that it was not conclusively determined by the Division that the employee attempting to use the toilet when the trailer tipped was Employer's employee does not negate employee exposure.[10] Thus, we find that Employer's employees had, with reasonable predictability, access to the zone of danger posed by the non-operational toilet facilities which were present at the harvesting site, proximate to the harvesting crew, and available for their use under the facts of this case.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's Decision denying Employer's appeal and assessing a civil penalty of $750.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

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[9] While it was common to leave the toilet trailer hooked to the pick-up truck, Lizaola stated that there were times it would be unhooked. Exhibit 6 depicts a toilet trailer which is not hitched to a truck.

[10] Employer maintains that the ALJ improperly permitted double hearsay to establish the identity of the person allegedly using the toilet as an employee of Employer. The observed tipping of the facility established a violative condition, i.e., non-operational facility. However, as discussed above, employee exposure does not require direct observation of an employee of Employer being exposed to a hazardous condition. (*Benicia Foundry & Iron Works, Inc., supra*). And, employee exposure may be established by circumstantial evidence demonstrating that exposure is more likely than not. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sept. 26, 2001).) Employer also asserts that Ali learned from DLSE agent Bowker, who translated Spanish for Ali, that the workers in the field were employees of Employer. Since Bowker determined this from the workers who spoke Spanish and neither he nor the workers testified, such determination was based upon double hearsay. We find upon our independent review of the record, that such hearsay was corroborative of other evidence from Employer's witnesses (Lizaola and Gill) that admitted that Employer had a harvesting crew at the site and such crew was actively harvesting lettuce as depicted in the photographs taken by Ali (Exhibits 3 and 4).